Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1299

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

KRISTINE M. GEBBIE, ASSISTANT DIRECTOR, HUMAN RESOURCES, ADMINISTRATOR, HEALTH DIVISION OF THE STATE OF OREGON,
PETITIONER,

v.

WILLIAM J. BRADY, M.D., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

BERNARD JOLLES
Jolles, Sokol & Bernstein, P.C.
721 S.W. Oak Street
Portland, Oregon 97205-3791
Telephone: (503) 228-6474
Counsel for Respondent

31 pp

QUESTIONS PRESENTED

Respondent does not accept the issues framed by petitioner. The issues are more accurately framed as follows:

1. Should this Court grant certiorari to review a case involving a denial of liberty in the course of terminating at-will employment where a jury given proper instructions, to which no exception was taken, found the government falsely charged the employee with dishonesty, immorality, and lack of integrity which foreclosed significant job opportunities, the court of appeals, after careful review, found the evidence sufficient for the jury to find as they did, and applied well established legal principles to those facts to affirm the jury's verdict?
2. Should this Court grant certiorari to review a jury verdict that the process offered failed to meet minimum standards of due process where the evidence showed,
   (a) the decision-maker was biased,
   (b) she announced her decision before hearing or considering any response of the employee by saying, "I don't know what in heaven's name you could tell me, Bill, that would make me change my mind,"
   (c) her assistant told Brady's lawyer that the meeting following the discharge was a mere courtesy and not a hearing, so that the State was simply going through the motions and not conducting a meaningful hearing,
   (d) she refused a reasonable continuance and re-

Questions Presented -- Continued

fused to grant a hearing solely because Brady was an at-will employee,

and the court of appeals, after careful review, found the evidence supported the jury's findings and affirmed the verdict by applying well-established law to those facts?

3. Should this Court grant certiorari to determine if Gebbie is entitled to qualified immunity based upon her claim that she could not be sure how much process was sufficient, where the jury found she failed to grant even the constitutional minimum of a meaningful hearing at a meaningful time, and the court of appeals affirmed that finding after careful review of the evidence and application of well established legal principles?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Response to Petition for Writ of Certiorari 1

Opinion Below 2

Juristiction 2

Constitutional Provision Involved 2

Statement of the Case 2

Factual Summary 2

The Writ should not be Granted and the Petition should be Dismissed 6

A. Introduction and Summary of Argument 6

B. Falsely accusing a government employee of dishonesty and theft in the course of terminating his at-will employment entitles the employee to a name-clearing hearing that comports with due process 7

C. The evidence supports the jury's finding, affirmed by the court of appeals, that the process offered Brady to enable him to clear his name did not pass constitutional muster 19

D. The facts found by the jury rebut Gebbie's claim of qualified immunity 21

Conclusion 23

TABLE OF AUTHORITIES

Cases Cited **Page**

Anderson v. Creighton, 483 U.S.—, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 23

Baden v. Koch, 799 F.2d 825 (2nd Cir. 1986) 13, 21

Barr v. Matteo, 360 U.S. 564 (1959) 18

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 10-12, 15

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) ..... passim

Brady v. Gebbie, 859 F.2d 1543 (9th Cir. 1988) .. passim

Cafeteria Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) 10

Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) 11-12

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 18

McGhee v. Draper, 639 F.2d 639, 642-43 (10th Cir. 1981) 6

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 21-22

Matthews v. Harney County, Or., School Dist. No. 4, 819 F.3d 889 (9th Cir. 1987) 20

Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) 14-15

Nathanson v. United States, 630 F.2d 1260 (8th Cir. 1980) 14

Cases Cited — Continued **Page**

New York Times v. Sullivan, 376 U.S. 254 (1964) 18

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) 12-13

Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), *vacated and remanded*, 438 U.S. 902 (1980) 14

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) 9-12

Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) 6, 8

Stretten v. Wadsworth, 537 F.2d 361 (9th Cir. 1976) .14

Velger v. Cawley, 525 F.2d 334 (2nd Cir. 1975), *rev'd on other grounds sub nom, Codd v. Velger*, 429 U.S. 624 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) 13

Ventetuolo v. Burke, 596 F.2d 476 (1st Cir. 1979).....15

Other Authorities

Bartlett, *Familiar Quotations*, 14th Ed., p. 386 (1968).. 13

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

KRISTINE M. GEBBIE, ASSISTANT DIRECTOR, HUMAN RESOURCES, ADMINISTRATOR, HEALTH DIVISION OF THE STATE OF OREGON,
PETITIONER,

v.

WILLIAM J. BRADY, M.D., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, William J. Brady, M.D., respectfully prays that the petition for certiorari to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Ninth Circuit in *Brady v. Gebbie*, Nos. 87-3839 and 87-3877, filed October 31, 1988, be denied.

OPINION BELOW

The court of appeals opinion is reported as *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988), is attached as Appendix A to the Petition for Certiorari. The district court did not issue an opinion.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

CONSTITUTIONAL PROVISION INVOLVED

Respondent accepts Petitioner's statement of the constitutional provision involved.

STATEMENT OF THE CASE

Factual Summary.

Petitioner (hereafter "Gebbie"), has set forth a factual summary which ignores the fact that this case was tried before a jury. For example, one of the hotly-contested issues before the jury was the nature of the office account. Gebbie contended it was a "private" account, used for Brady's private purposes. Brady contended otherwise. He claimed it was used only for legitimate public purposes, and that he received no personal benefit therefrom. The jury agreed with him. Nevertheless, petitioner, at the outset of her factual summary, airily asserts that on June 2, 1986, Brady told Gebbie he had kept a "private office account."

The facts are far more accurately set forth in the opinion of the court of appeals. *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988). *See* Petition for Cert. App-A. As found by that court, there was evidence in the record from which the jury could and did find that Gebbie falsely accused Brady of keeping a "slush fund," systematically misusing public funds over a 16-year period, diverting or funneling public funds into a personal account, violating conflict of interest rules by conducting private autopsies for personal gain while using state facilities, and causing the state to be billed for toxicology charges on his private autopsies.

The jury found all of these allegations false and rightly so. There was no "slush fund." The unsolicited monies received for pituitary gland contributions were used strictly for legitimate office purposes. The account was openly kept and everyone in the medical examiner's office was aware of it. It was "off budget," but there was uncontradicted evidence of similar accounts kept by other state officials for which no disciplinary action, let alone discharge, was ever administered. With respect to the performance of private autopsies for which he was paid by private parties, that practice was specifically authorized and encouraged by the state. All pathologists in the medical examiner's office performed private autopsies for pay. In fact, the testimony was that part of the inducement for physicians to accept employment in the medical examiner's office was that they would be permitted to perform private autopsies to supplement their state salary which was far below what a physician could ordinarily earn in private practice. Though Gebbie denied she was aware of this practice, there was evidence from which the jury could have found otherwise. There was also evidence from which the jury could have found she knew about the office account and did nothing about

it until it became a hot media issue. The jury could have legitimately inferred that she used Brady as a scapegoat to divert attention from her own shortcomings.

With respect to the alleged process offered by Gebbie, the court of appeals correctly found:

> Brady testified that on September 21, 1985 — prior to the time Gebbie handed him the letter of "proposed" discharge — Gebbie told him "I don't know what in heaven's name you can tell me, Bill, that would make me change my mind." Dr. Harris, who was present at that meeting, also testified that Gebbie told him "I can't conceive of what the reasons will be" in reference to Brady's possible response to the charges. Hoevet testified that he saw Gebbie on a television news program prior to the October 2, 1985 meeting, at which time Gebbie said she couldn't think of what would make her change her mind about terminating Brady. He also testified that prior to the October 2, 1985 meeting, Gebbie wrote a letter to another doctor in which she stated that she had fired Brady. A jury could reasonably infer from this evidence that Gebbie had made up her mind about Brady before the meeting and would have disregarded any evidence which Brady presented in mitigation or rebuttal.
>
> Moreover, there was sufficient evidence presented from which a jury could reasonably infer that Gebbie did not allow Brady sufficient time to prepare for the meeting, and thus did not give him a "meaningful" opportunity to respond to the charges. Several witnesses testified regarding Gebbie's repeated refusal of requests for a

> continuance of the October 2, 1985 meeting. Hoevet testified that prior to the meeting he had asked Hirst for a continuance, and that the request was refused on September 30, 1985 by one of Gebbie's aides. Dr. Harris testified that he and a group of pathologists had tried to get both a hearing for Brady and a delay of the meeting. Snyder testified that on the day of the meeting she also requested a delay. In addition, both Harris and Snyder gave testimony that Gebbie had asked specific questions at the October 2, 1985 meeting as to whether Brady had used particular pieces of equipment for private autopsies, and that she had refused Brady's request for a continuance to have time to check his records. A jury could infer from this that the "hearing" was a mere formality and that Gebbie did not give Brady a "meaningful opportunity" to clear his name or be heard. *See Matthews*, 819 F.2d at 893-94 ("[d]ue process of law [is not present] where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard")(quoting *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987). (Petition for Cert. App-22-23)

Furthermore, it is important to note that Gebbie denied Brady a hearing not because he was not entitled to a liberty interest, but solely because he was an at-will employee. Gebbie did not even address the liberty interest issue in refusing to grant Brady due process. Her lawyer testified she advised Gebbie not to grant Brady a hearing solely because he was in executive service and, therefore, an at-will employee.

Moreover, when Gebbie issued her letter of suspen-

sion and proposed termination, together with the attendant press releases, she gave credence and legitimacy to the swirl of wildly false charges being leveled against Brady in the media. *See McGhee v. Draper*, 639 F.2d 639, 642-43 (10th Cir. 1981).

THE WRIT SHOULD NOT BE GRANTED AND THE PETITION SHOULD BE DISMISSED

A. Introduction and Summary of Argument.

This case turns upon its facts. The court of appeals simply applied well-settled law to the facts found by the jury. Gebbie claims the court of appeals committed three errors. In two of them, that the court of appeals (1) adopted a "*per se*" rule for determining whether a liberty interest is implicated, and (2) held the issue of what process is due is always for the jury, the court simply did not make any such rulings. The third claimed error with respect to the existence of qualified immunity turns upon the facts found by the jury. The facts show Gebbie failed to give Brady even the minimum due process required by law. As the court of appeals stated, there was no need to reach the question of whether more than the minimum was due, even though there was evidence to support that proposition. 859 F.2d, at 1555, n. 11. In addition, all three contentions involve the resolution of disputed questions of fact. Both the jury and the court of appeals found the facts in Brady's favor. "[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Rule 17.1 sets forth the kinds of reasons which the Court considers in granting a writ of certiorari. Only sections (a) and (c) are even arguably involved in this

case. Those sections provide:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter...
>
> * * *
>
> (c) When a...federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

In order to bring herself within these principles, Gebbie asserts the court of appeals made three legal holdings, each of which is allegedly an "unwarranted extension" of constitutional principles. Because of these alleged rulings, she claims life has been made more difficult for public officials who wish to terminate their at-will subordinates and explain the reasons for their decision. Nowhere in her brief does Gebbie mention there are two certain ways to avoid liability — either tell the truth about what the employee has done or grant him a reasonable opportunity to clear his name.

In any event, the alleged "unwarranted extensions" of constitutional principles are a figment of Gebbie's imagination in an attempt to get this Court to review a decision of the court of appeals which is simply an application of existing law to the specific facts of the case.

B. Falsely accusing a government employee of dishonesty and theft in the course of terminating his at-will employment entitles the employee to a name-clearing hearing that comports with due process.

Gebbie's discussion of whether Brady had a liberty interest entitled to due process protection is either disingenuous or reflects a fundamental misunderstanding of the nature of the protection afforded by the 14th amendment.

1. There is no conflict in the cases decided by this Court, among the circuits, within the Ninth Circuit, or between the Ninth Circuit decision in this case and any decision of this Court or any other court.

Gebbie first contends there is conflict among the previous decisions of this Court, or that this Court has never previously held that the discharge of an at-will employee, plus stigmatizing, defamatory statements, entitles the employee to a name-clearing hearing if he contests the charges. This contention simply ignores this Court's cases.

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), plaintiff had a one-year contract at Wisconsin State University. He had no tenure and no property right in public employment. He was not rehired and no reason was given. In answering Roth's liberty interest claim, the Court said:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (Citing cases.) In such a case, due process

> would accord an opportunity to refute the charge before University officials...(408 U.S., at 573)

Gebbie quibbles with this clear language, claiming the Court in "the next breath," indicated more than reputational injury is required (Petition for Cert. 15). Gebbie simply misreads the case. After holding that nonrenewal plus defamation which charges dishonesty or immorality implicated a liberty interest, the Court mentioned another situation in which due process required a hearing.

> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, *again*, would be a different case... (408 U.S., at 573-74; emphasis added)

Roth is, thus, a clear holding recognizing that defamation which charges dishonesty or immorality, together with termination or failing to rehire an at-will employee, is sufficient to implicate a liberty interest. A stigma which forecloses employment opportunities, without necessarily impugning morality or honesty, also suffices.

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), held defamation without more does not implicate a liberty interest. Under those circumstances, a state court action for defamation suffices to protect the citizen's interest. However, defamation plus discharge from employment does implicate a liberty interest. *Paul* is, thus, totally consistent with *Roth*. The Court in *Paul* reaffirmed *Roth*, but distinguished it because *Paul* claimed defamation only. 424 U.S., at 709-10.

Next, Gebbie attempts to manufacture a conflict between *Paul* and *Roth*, on the one hand, and *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), on the other. In *McElroy*, the government revoked the security clearance of a short-order cook which had the effect of depriving her of employment at one government facility. This Court pointed out there was no evidence of stigma.

> There is nothing to indicate that this determination would in any way impair Rachel Browner's employment opportunities anywhere else. As pointed out by Judge Prettyman, speaking for the Court of Appeals, "*Nobody has said that Brawner is disloyal or is suspected of the slightest shadow of intentional wrongdoing.* 'Security requirements' at such an installation, like such requirements under many other circumstances, cover many matters other than loyalty." 284 F.2d, at 183. For all that appears, the Security Officer and the Superintendent may have simply thought that Rachel Brawner was garrulous, or careless with her identification badge. (367 U.S., at 898-99; emphasis added)

All three cases are remarkably consistent. All apply the rule that reputational damage which impugns honesty or morality, together with loss of at-will employment, is sufficient to implicate a liberty interest. In *Roth and McElroy*, there was no reputational damage so the liberty interest claim was denied. In *Paul*, there was no loss of government employment, so the liberty interest claim was denied. There is no conflict among these cases whatsoever.

But this is not all. There are other cases. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976),

held that an at-will police officer who was terminated was not deprived of liberty because the charges were not publicly disclosed. His interest in his, "good name, reputation, honor or integrity" (426 U.S., at 348), was therefore not impaired. If it were, his liberty interest would have been implicated. Again, the Court clearly recognized and applied the rule that termination of an at-will employee, plus publicly-disclosed defamatory statements impugning honesty or morality, is sufficient to implicate a liberty interest.

Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), is also consistent. There, a police officer was terminated and a report of an alleged suicide attempt was circulated. Gebbie claims the Court never reached the issue of whether or not defamation impugning honesty or morality, together with termination of at-will employment, is sufficient to implicate a liberty interest (Petition for Cert. 14). Again, Gebbie has misread the case. The issue which the Court declined to reach was not whether stigma plus loss of at-will employment was sufficient to implicate a liberty interest. What they refused to reach was whether a report of an alleged suicide attempt imposed a stigma, and whether that stigma was serious enough to implicate a liberty interest. The Court did not reach this question because the police officer never claimed the suicide report was false. 429 U.S., at 626-627. The Court, however, recognized and reaffirmed the rule in *Roth* and *Bishop* that a hearing is required when a non-tenured employee is stigmatized or defamed in the course of terminating his employment. "Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required..." 429 U.S., at 628.

Lastly, *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), involved the discharge of an at-will police chief amid charges of dishonesty. The city claimed the trial court erred in finding a deprivation of liberty. The Court, again, affirmed the formulation in *Roth*, *Paul*, *Bishop*, and *Codd*.

> *Wisconsin v. Constantineau*, 400 US 433, 437, 27 L Ed 2d 515, 91 S Ct 507 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake, because of what the government is doing to him, notice and an opportunity to be heard are essential." In *Board of Regents v. Roth*, 408 US 564, 573, 33 L Ed 2d 548, 92 S Ct 2701 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and association in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city — through the unanimous resolution of the City Council — released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. *Paul v. Davis*, 424 US 693, 710, 47 L Ed 2d 405, 96 S Ct 1155 (1976). Yet the city twice refused petitioner's request that he be given written speci-

> fication of the charges against him and an opportunity to clear his name. *Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.* (445 U.S., at 633-34, n. 13; emphasis added)

Even the dissenting Justices in Owen agreed that termination plus stigmatization requires a name-clearing hearing. "Due process requires a hearing on the discharge of a government employee 'if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination...' " 445 U.S., at 661.

There is simply no inconsistency in this Court's prior cases. All the cases hold a defamatory statement which impugns morality or honesty, i.e., which stigmatizes the employee in the course of terminating his at-will employment, entitles the employee to a name-clearing hearing. Gebbie's inability to discern the consistency in this Court's prior cases recalls Matthew Henry's observation, "There are none so blind as those who will not see." Bartlett, *Familiar Quotations*, 14th Ed., p. 386 (1968)

Gebbie's myopia is equally apparent in her attempt to manufacture a conflict among the Circuits. She claims *Velger v. Cawley*, 525 F.2d 334 (2nd Cir. 1975), *rev'd on other grounds sub nom, Codd v. Velger*, 429 U.S. 624 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), is inconsistent with *Baden v. Koch*, 799 F.2d 825 (2nd Cir. 1986). *Velger* did not hold the stigma must foreclose employment opportunities. The Court merely held the accusation — a suicide attempt — was serious because it, "could have the effect of...depriving him of employment..." (525 F.2d, at 336).

In *Baden*, the Court held stigma plus demotion implicated, albeit weakly, a liberty interest. Both cases relied

on the *Roth* formulation that stigma plus termination is sufficient.

Gebbie's analysis of these two cases points up her basic confusion. A defamatory comment about an employee is sufficient if it is serious enough to impose a stigma. The only significance of foreclosure of other employment is that it is one way to measure the seriousness of the defamation. Thus, any implication of dishonesty or immorality is serious enough to impose a stigma because it places honor and integrity in question. It is also serious enough to interfere with other employment. For that reason, any termination accompanied by charges of dishonesty or immorality is sufficient to implicate a liberty interest. *See Roth*, 408 U.S., at 573-74.

The Eighth Circuit cases cited by Gebbie (Petition for Cert. 16), establish the same proposition. Far from being in conflict with *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977), *vacated and remanded*, 438 U.S. 902 (1980), *Nathanson v. United States*, 630 F.2d 1260 (8th Cir. 1980), cites and relies upon *Owen*. The only difference is that in *Nathanson* the alleged defamation was not sufficiently serious (inability to accept guidance, etc.). In *Owen*, the defamation was sufficient because it impugned the employee's honesty and integrity. There is no inconsistency. The same rule was applied in both cases. The facts were different, so the result was different.

Similarly, *Stretten v. Wadsworth*, 537 F.2d 361 (9th Cir. 1976), is not inconsistent with this case. *Stretten* merely held a charge of incompetency was not sufficient to impose a stigma. In *Brady*, the charges involve dishonesty and immorality. Those charges are universally held to impose a stigma and to implicate a liberty interest.

Finally, Gebbie cites *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985), for the proposition that any defamation must involve charges of immorality, dishonesty, etc., *or*

impose a stigma which forecloses employment opportunities. She claims this is inconsistent with the Ninth Circuit's decision in this case. This particular claim borders on the frivolous. The Ninth Circuit announced the rule as follows:

> "[A] liberty interest is implicated in the employment termination context if the charge impairs a reputation for honesty or morality." *Matthews v. Harney County, Or., School Dist. No. 4*, 819 F.2d 889, 891 (9th Cir. 1987). (859 F.2d, at 1552; emphasis added)

This is virtually identical to *Munson* and is consistent with every other case cited by Gebbie. Nor is *Ventetuolo v. Burke*, 596 F.2d 476 (1st Cir. 1979), any different. In fact, that case states one way to implicate a liberty interest in the course of firing an at-will employee is to make, "'any charge...that might seriously damage his standing and association in [the] community.'" (596 F.2d, at 482, *citing*, *Roth* and *Bishop*, *supra*.)

In this case, Gebbie charged Brady with using state funds for his private purposes (i.e., stealing), performing private autopsies for pay while using state facilities and equipment, in violation of conflict of interest rules, violating public trust and confidence, and billing the state for toxicology charges he should have paid himself. In addition, she charged him with knowingly violating trust and confidence, a systematic 16-year diversion of public funds to his own use, and generally failing to measure up to the integrity and ethics required of public employees. *See*, Petition for Cert. App-B.

Is there any question these charges, "seriously damaged [Brady's] standing and association in the community"? *Ventetuolo*, 596 F.2d, at 482; *Roth*, 408 U.S., at 573. The charges leveled against Brady would be sufficient to implicate a liberty interest in any Circuit in

the country. They even satisfy Gebbie's formulation of the rule. Gebbie has, therefore, constructed a straw man (that the Ninth Circuit adopted a rule that *any* defamatory remark plus termination of an at-will employee is sufficient to implicate a liberty interest), and has then proceeded to attempt to demolish that straw man by completely misreading the cases she cites. The plain fact is the Ninth Circuit adopted no such rule. The rule they did adopt is clearly set forth in the opinion (859 F.2d, at 1552; *see* p. 15 of this brief). This rule is consistent with every case decided by this Court or any of the Circuits.

2. Even if the "rule" contended for by Gebbie, were inconsistent with the rule stated by the Ninth Circuit, there is no basis for granting certiorari for two reasons:

(a) There was overwhelming evidence of both foreclosure of employment opportunities and charges impugning honesty, integrity and morality; and,

(b) The jury was instructed precisely as Gebbie contends the rule should be, and they decided the case in Brady's favor.

It is almost beyond belief that, although Gebbie claims the charges she leveled against Brady were not serious enough to implicate a liberty interest, nowhere does she cite a case that even intimates these charges are insufficient. As indicated, the charges are the most serious kind imaginable for a public employee. The jury found all of them false. Summarized, they are:

(a) Brady established a personal autopsy business conducted from the medical examiner's office using state facilities, employees, equipment and time, and lined his own pockets with the money obtained;

(b) Brady did federal government autop-

sies which the federal government paid for. This money should have gone to the state, but Brady stole it;

(c) Brady systematically stole $16,000 from money paid to the State of Oregon which he placed in a private bank account and used for office parties and lunches; and,

(d) Brady charged the state for lab services on his private autopsies which should have been paid by him. (App. B petition for certiorari)

Gebbie further embellished these charges by accusing Brady of knowingly violating public trust and confidence. She stated that trust and confidence in state government could not be restored if Brady continued to work.

Can anyone doubt these charges severely impugn Brady's character for honesty, morality or integrity? Can anyone imagine another government employer wanting to hire someone who has systematically stolen money from his last government employer and has violated every ethical principle imaginable? If these charges are not serious enough to implicate a liberty interest, it is difficult to imagine any which would be sufficient. In addition to the charges themselves, the court of appeals correctly found abundant evidence of foreclosure of employment opportunities. 859 F.2d, at 1558.

Furthermore, the trial court required the jury to find foreclosure of employment opportunities before they could return a verdict in favor of Brady. The court listed what the jury had to find.

> One, that in the course of discharging [sic] plaintiff defendant made certain charges against the plaintiff which were false; two, that defendant voluntarily published or caused to be published the charges made against plaintiff; three, *that those charges placed a stigma upon*

> *plaintiff's good name, reputation, honor or integrity; four, that the charges imposed a stigma on plaintiff that foreclosed his freedom to take advantage of other employment opportunities*; five, that plaintiff was, in fact, denied an opportunity to clear his name through notice and a hearing. (Closing Argument Tr. 73-74; emphasis added)

No exception was taken to this instruction.

This case was not submitted to the jury based upon any *"per se"* rule. The jury was clearly instructed that they had to find stigmatization which impugned Brady's honor and integrity, and foreclosed employment opportunities. There was evidence from which the jury could have found those elements. The court of appeals agreed that the evidence justified such a finding. Therefore, there is no reason to grant a writ of certiorari to decide whether there is a *"per se"* rule or not. The simple fact is this case was tried and submitted to the jury in accordance with Gebbie's theory. Not only is there no conflict with previous cases, there is no issue in this case. Under any possible formulation of the rule as to when a terminated at-will employee is entitled to a name-clearing hearing, Brady was entitled to such a hearing.

Gebbie's discussion of 1st amendment libel cases, *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and the absolute immunity case of *Barr v. Matteo*, 360 U.S. 564 (1959), completely misses the point. This is not a suit for defamation. Government officials are free to fire at-will employees without liability. They can even fire and stigmatize them without liability. However, if they fire and stigmatize them, due process requires they be given an opportunity to rebut the charges in a name-clearing hearing. It is the failure to grant a meaningful name-clearing hear-

ing that is the touchstone of liability in this case.

C. The evidence supports the jury's finding, affirmed by the court of appeals, that the process offered Brady to enable him to clear his name did not pass constitutional muster.

Gebbie's argument on the process offered Brady is curious. She claims the Ninth Circuit erred in holding the process due is always a question of fact for the jury. The court made no such holding. Gebbie has been unable to point to any language in the court's opinion which suggests the process due is always a jury question. As a matter of fact, all the court of appeals held was that the process offered–a meeting before a biased decision-maker who was simply going through the motions–could be found by the jury to be less than constitutionally required. The court of appeals did not hold the process, such as it was, insufficient as a matter of law. It only held that the jury could find it was insufficient on the facts of the case. This is a far cry from saying that the adequacy of the process offered is a jury question in every case.

The facts show Gebbie was biased, Brady was not given sufficient time to prepare for the hearing, a continuance was unfairly refused, the hearing was a mere formality, and Brady was denied an opportunity to check his records in order to respond to specific questions. These facts do not constitute a meaningful opportunity to be heard.

Moreover, the trial court instructed the jury as follows:

> Due process requires a fair hearing. The minimum, there must be an opportunity to be heard at a meaningful time and in a meaningful

> manner. There is no rigid requirements as to the type of hearing a person is entitled.
>
> The nature of the hearing which must be provided depends upon the circumstances of the particular case. The factors to be considered include the private interest that will be affected — that will be the interest of the plaintiff Brady, the risk of erroneous deprivation of that interest through the procedures used and the physical and administrative burdens that any additional procedure requirements would entail. (Closing Argument Tr. 74)

No exception was taken to this instruction, nor did Gebbie urge any error in that instruction on appeal. The only remaining question is whether there was evidence from which the jury could find the process inadequate or not meaningful in time or manner. Again, since there was evidence Gebbie had already made up her mind and would not be swayed by any evidence, the jury could conclude she was biased. Since there was evidence from Gebbie's own assistant that the meeting was not a real hearing, but the state was simply going through the motions as a courtesy, the jury could have concluded this was not a meaningful opportunity to clear his name. This is all the court of appeals held. 859 F.2d, at 1554-55. It did not hold that in every case "meaningfulness" is a jury question. It only held that in this case it was a jury question because of the evidence. See *Matthews v. Harney County, Or., School Dist. No. 4*, 819 F.3d 889 (9th Cir. 1987). Gebbie has not pointed to any reason why this evidence should be ignored. The court's approach, therefore, is not, "sharply inconsistent with that of several other circuits," nor is it, "flatly wrong." (Petition for Cert. 25.)[1]

D. The facts found by the jury rebut Gebbie's claim of qualified immunity.

Here again, Gebbie misreads the court's opinion. According to her:

> Under the Ninth Circuit's approach, there are no constitutional minimums for a name-clearing hearing. Thus, no administrator can know in advance, nor can any government attorney advise, that a particular form or timing of pre-hearing notice will suffice; a jury may think that ten days' notice, rather than seven, would have been more "meaningful." (Petition for Cert. 29)

This is arrant nonsense. The constitutional minimums are those that grant the employee a meaningful opportunity to clear his or her name. It is impossible to lay out in cookbook fashion the precise recipe to avoid liability in every case. Each case must be decided on its own facts. The court of appeals stated:

> To determine what process is due in an individual case — and if it is due before or after the deprivation of a constitutionally protected interest — a court must apply the three-part test set out in *Mathews v. Eldridge*, 424 U.S. at 334-35, 96 S.Ct. at 902. That test balances 1) the

---

[1] *Baden v. Koch* (799 F.2d 825 (2nd Cir. 1986), is not inconsistent. There, Baden contended he was entitled to more process than he received. Since the process offered met constitutional minimums (i.e., it was fair), and Baden had only a weak liberty interest, the minimum was sufficient. In Brady, the jury found the process offered did not even meet the minimum standard of a meaningful opportunity to be heard. Therefore, the court of appeals held there was no need to consider if Brady was entitled to more than the minimum, even though the evidence justified such a finding. 859 F.2d, at 1555, n. 11.

> private interest that will be affected, 2) the risk of an erroneous deprivation of that interest through the procedures used, and 3) the additional cost and administrative burdens that additional procedures would entail. *Id.* Thus, although a hearing where the individual has an opportunity to rebut the charges against him is always required in due process cases, when the hearing must be held and what procedural protections must be granted at the hearing are determined on a case-by-case basis. (859 F.2d, at 1554)

The court of appeals held the law was clearly established in 1985 that publicly-disclosed charges of immorality or dishonesty implicated a liberty interest, requiring a due process hearing if the accuracy of the charge was disputed. The law also clearly required that the hearing be meaningful in time and manner to give employee a reasonable opportunity to clear his name. The court then examined the process provided in the light of *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and found that the unlawfulness of Gebbie's actions would have been apparent. This is obvious in the light of the facts found by the jury. Clearly, Gebbie had to know the law established, at a minimum, that the hearing must be fairly conducted by a reasonably fair decision-maker. In this case, the jury found neither existed. How could anyone reasonably believe they could grant a sham hearing before a biased adjudicator and still comply with due process? The court of appeals was clearly correct that there was sufficient evidence from which the jury could infer that a reasonable official would have known Gebbie's conduct was violating Brady's constitutional right to minimum process. (859 F.2d, at 1557.) This is certainly a far cry from

holding that a jury can second-guess any process offered by a state official.

In deciding immunity, this Court has previously held the inquiry must be fact specific. *Anderson v. Creighton*, 483 U.S.—, 107 S.Ct. 3034, 97 L.Ed.2d 523, 532 (1987). The "fact specific" inquiry, for purposes of qualified immunity in this case, is:

> In 1985, could the defendant, as a matter of law, reasonably believe that an at-will state employee who was publicly and falsely accused of dishonesty, immorality and a breach of public trust, in the course of terminating his employment, would not be entitled to a hearing to clear his name before an unbiased decision-maker who was not conducting a sham inquiry?

The question answers itself. The jury found all the relevant facts against Gebbie, despite her contentions to the contrary. It is far too late to contest those facts in this Court. Gebbie was not entitled to immunity as a matter of law.

CONCLUSION

1. Gebbie's claim that this Court should grant certiorari because the court of appeals held any defamation is sufficient to implicate a liberty interest is without merit for two reasons: First, the court of appeals adopted no such rule. 859 F.2d, at 1552. Second, Gebbie's claim that more than "any defamatory statement" is necessary is obviated because the trial court instructed the jury they had to find the charges impugned Brady's honesty and integrity, *and* that he lost employment opportunities.

2. Gebbie's claim that the court of appeals adopted a rule that the question of whether the process offered is meaningful is always for the jury is also without merit. No such rule was adopted. All the court of appeals held was that, in this case, the evidence was sufficient to submit the issue to the jury. Gebbie has not even attempted to show the evidence was not sufficient.

3. Gebbie's claim of qualified immunity, likewise, does not justify granting certiorari in this case. Gebbie did not act in "unquestioned good faith," and the law requiring a hearing to enable an employee to clear his name after being terminated and stigmatized was well settled. The evidence showed a reasonable official would have known Gebbie's conduct violated Brady's constitutional rights.

In short, every claim of Gebbie involves a determination of the facts surrounding Brady's discharge. The jury found the facts in Brady's favor. The court of appeals affirmed by applying well established law to those facts. Certiorari is not a device for reexamining facts, nor for determining the sufficiency of the evidence. The petition for a writ of certiorari should be denied, and the court of appeals affirmed.

Respectfully submitted,

BERNARD JOLLES
Jolles, Sokol & Bernstein, P.C.
Counsel for Respondent